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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-132.

ROAN SELECTION TRUST LIMITED, and
AMERICAN METAL CLIMAX, INC.,
Petitioners,

v.

HAROLD E. KOHN, Trustee, et al.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNTED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INTRODUCTION.

The petitioners frame three questions for review. The first, as to the propriety of a "collateral attack upon the Zambian judgment" and "revision of the reorganization", is cast in terms of an overbroad range of legal and factual determinations. The second, in regard to the role of intent and reliance under Section 10(b) of the Exchange Act and Rule 10b-5, is academic in view of both the law, and the facts found by the District Court and sustained on appeal. The third, in regard to the propriety of equitable relief, as ordered by the District Court and affirmed on appeal, was properly addressed to the sound discretion of the District Court. None of the individual contentions of law suggested by the Petition warrants review.[1]

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1. The Petition seeks, indirectly, to put in issue a wide variety of determinations by the courts below through presentation of the facts of the case as viewed by a dissenting judge, rather than by the District Court or the majority of the Court of Appeals. See, e.g., Petition at pp. 6-7 and 19, n. 17.

As stated by the Court in *Smith v. Burnett*, 173 U. S. 430, 436 (1899), "[w]e are remitted, then, to the consideration of the facts, and as to them the rule is firmly established that successive decisions of two courts in the same case, on questions of fact, are not to be reversed, unless clearly shown to be erroneous". See also, *Wupperman v. The Carib Prince*, 170 U. S. 655, 658 (1898). With respect to even a direct appeal, this Court has held, "[w]e do not try the facts of cases de novo". *United States v. E. I. Du Pont De Nemours & Co.*, 351 U. S. 377, 381 (1956).

ARGUMENT.

I. The Petitioners' First Question for Review.

A. The Decisions of the Courts Below Have No International Impact.

The Petition, at pp. 17-8, raises questions of international affairs which are in fact irrelevant to this case. At issue is a voluntary, rather than an involuntary, reorganization of a corporation.[2] Section 15 of the Zambia Companies Ordinance, appended at page A-6 of the Petition, states that, "Where a company has passed a resolution for reducing share capital, it may apply to the Court by petition for an order confirming the reduction".

The Zambian court, at most, approved, but did not require, reorganization. The reorganization, in the form of a merger of Roan Selection Trust Limited (RST) into the American company, American Metal Climax, Inc. (AMAX), was formulated by the petitioners-defendants, not at the behest of the government of Zambia. The respondents' original and amended complaint objected to the merger under, *inter alia*, the Securities Exchange Act of 1934. The respondents *approved* and did not object to the partial acquisition of RST assets by the Zambian Government. This is evidenced by the preliminary injunction, sought by respondents and granted by the District Court, which enjoined RST from seeking approval by the Zambian court of the RST-AMAX merger, but did not enjoin RST from seeking such approval for the Zambian acquisition. Appendix to the Petition for Certiorari filed June 29, 1972

2. Moreover, the relief ordered by the District Court, affirmed on appeal, based on violations of the Exchange Act, requires petitioners to offer to the RST shareholders in exchange for their RST holdings, a security position in a Delaware corporation, wholly owned by respondents, to which the RST assets were transferred. This relief has no impact on any interest of the Zambian government.

by respondents herein in *Harold E. Kohn, et al. v. American Metal Climax, Inc., et al.*, No. 72-5, October Term, 1972, at p. 142. Nor did the Court of Appeals purport to "apply American law to that corporation's [RST's] internal affairs", as claimed by the Petition at p. 18. The findings of violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5 relate to the representations voluntarily made in this country in the exchange of securities of foreign and domestic corporations in this country, all of which securities are traded on either a national securities exchange or in the over-the-counter market in this country. Such transactions are clearly within the purpose of the Securities Exchange Act, "[t]o provide for the *regulation of . . . over-the-counter markets operating in interstate and foreign commerce* and through the mails, [and] to prevent inequitable and unfair practices on such . . . markets . . . .". Preamble to the Securities Exchange Act, 48 Stat. 881 (emphasis added).

The international conflict which is conjured is, for all these reasons, illusory. The Court resolved a similar purported conflict in *SEC v. National Securities, Inc.*, 393 U. S. 453, 463 (1969), as follows:

> "It is clear that any 'impairment' in this case is a most indirect one. The Federal Government is attempting to protect security holders from fraudulent misrepresentations; Arizona . . . is attempting to protect the interests of the policy holders. Arizona has not commanded something which the Federal Government seeks to prohibit. It has permitted respondents to consummate the merger; it did not order them to do so."[3]

3. See also, *New Zealand Loan and Mercantile Agency Company, Ltd. v. Morrison* (1888) A. C. 349, P. C., limiting the international reach of the English counterpart to the Zambia Companies Ordinance.

Despite the petitioners' frequent allusions to international interests and international impact, neither the State Department nor the Government of Zambia has sought to enter this litigation as *amicus curiae* or to otherwise express a view as to its outcome. All that is involved is the right of investors to the protection of the securities laws of the United States for misrepresentations and omissions in the United States relating to the sale and exchange of securities all of which are traded in the United States.

B. The Court of Appeals Made No De Novo Findings.

The Petition, at pp. 12-3, neglects to disclose the findings of violations of Section 10(b) and Rule 10b-5 by the District Court, and proceeds to allege that, "the Court of Appeals concluded that it was free to examine *de novo* questions of disclosure in RST's explanatory materials, that Rule 10(b)-5 had been violated in certain respects, and that the rescision remedy ordered by the District Court was appropriate". This allegation appears to fall within the broad framework of the first Question presented for review.

It is beyond question that the violations of Section 10(b) and Rule 10b-5 were fully litigated in the District Court. A major portion of the "Defendants' Brief, Proposed Findings of Fact, and Conclusions of Law, and Motion to Strike" in that court was devoted to the violations of Section 10(b) and Rule 10b-5, and organized under the heading, "Plaintiff has failed to prove any violation of the Securities Exchange Act of 1934".

The Opinion of the District Court initially states that among the issues presented is "whether the Explanatory

Statement and its Appendices were false or misleading in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j, and Rule 10b-5, promulgated thereunder". 322 F. Supp. at 1350-51. The Opinion evinces thorough consideration of the violations and concludes, *inter alia,* that, "[t]he Explanatory Statement and its Appendices violate the Securities Exchange Act of 1934, 15 U. S. C., § 78j, and Rule 10b-5 promulgated thereunder". 322 F. Supp. at 1365, and 1358-63.

In the Court of Appeals the petitioners devoted a major portion of their Appellants' Brief to the particular findings of violations.[4] The Opinion of the Court of Appeals is structured in terms of the findings of violations by the District Court. 458 F. 2d 255 at 262-69.

C. The Zambian Judgment Is Not Based on Findings Sufficient to Support Collateral Estoppel.

The petitioners' contention that the federal courts should have estopped the specific findings of violations of Section 10(b) and Rule 10b-5 through recognition of "findings" of the Zambian court is without substance. The Zambian Order contains no findings regarding the adequacy of disclosure. That Order is appended at p. A-1 of the Petition.

Many years ago the Court enunciated the principle that for estoppel to take effect:

> ". . . it must appear, either upon the face of the record or be shown by extrinsic evidence, that the *precise* question was raised and determined in the former suit. If there be *any uncertainty* on this head in the record—*as, for example: if it appear that several distinct matters may have been litigated, upon one or*

4. They entitled that Section, "The District Court held erroneously that the proxy materials violated the Exchange Act".

> *more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention,* unless this uncertainty be removed by extrinsic evidence showing the *precise point* involved and *determined.*" *Russell v. Place,* 94 U. S. 606 (1877) (emphasis added).

See also 1B Moore, *Federal Practice* (1965 Ed.), ¶ 0.443[4] at 3915.[5]

An examination of the authorities cited at page 14 of the Petition will show them to be entirely inadequate to establish that specific findings of fact were made by the Zambian court as to the representations and omissions forming the basis of the District Court's findings of violations, sustained by the Court of Appeals. These few cases [6] state only the most general principle of fraud, without the particularity of Rule 10b-5, or the refinements that have developed under that Rule through case law. The cases cited by the petitioners clearly indicate a less settled, and less vigorous policy than under the Rule. The petitioners quote the language of Maugham, J. in *In Re Dorman, Long & Co., Ltd.* [1934] Ch. 635 requiring disclosure "of all the main facts as will enable them [the shareholders] to exer-

5. "If, however, the judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then *none* of them is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudicated by the rendering court." (Emphasis added)

6. The Petition also relies upon two affidavits of counsel, including one authored by a member of the firm of Zambian solicitors which represents RST. Neither of these affidavits contains more than a general assertion that representations must not be deceptive. Neither further defines, or elucidates, the standard applied, and neither cites either case or statutory authority in this regard.

cise their judgment".[7] The following sentence in that opinion states that the court is "prepared to believe that there are cases where even this is impracticable . . .". That court then suggests that if in such cases a report of a disinterested committee of shareholders is included, there would be no duty to make a statement of all the main facts necessary to enable independent judgment. *Id.* at 666.

In another of the cases cited by the petitioners, *Caruth v. Imperial Chemical Industries, Ltd.* [1937] A. C. 707, 768 (H. L.), Lord Maugham suggests that, "It is indeed difficult to see that the criticism of the circular can have any real weight when it is remembered, first, that counsel for the appellant has with equal candour and fairness explained in each tribunal that he was making no attack whatever on the directors and was admitting their complete good faith and, secondly, that no single holder of deferred shares has come forward to state on affidavit that he had been in the least misled by the circular". Nor are the cases cited by petitioners typical of a uniform policy of disclosure. See, *e.g., Hallows v. Fernie* (1868) 3 Ch. App. 467, 474-79; *Percival v. Wright,* (1902) 2 Ch. 421; *Akerheim v. de Mare* [1959] A. C. 789, P. C. See also, *Report of The Attorney General's Committee on Securities Legislation in Ontario* (1965), ¶¶ 2.22, 2.23.[8] For this reason, as well, they do not

7. Petition at p. 14, n. 13.

8. Paragraph 6.07 of that Report reflects the inadequacy of the common law to satisfy the purposes of the federal securities laws:

> "In the United States, the law respecting the form of proxies and proxy solicitation has developed in a somewhat different manner than in the United Kingdom and Canada. As a result of certain abuses of the proxy in the United States, a detailed and comprehensive set of rules was passed under Section 14(a) of the Securities Exchange Act of 1934 . . . . The information included in the proxy statement must be clearly presented and the statements therein divided into groups according to subject matter . . . . The proxy statement or its equivalent has no counterpart in the law of either the United Kingdom or Canada where the general rule laid down by the

demonstrate a uniform standard of scrutiny consistent with that under the Rule.

This lack of a vigorous and uniform standard casts doubt on whether the specific allegations of material misrepresentation and omission were scrutinized, and determined by the Zambian court, under a test comparable to that of Rule 10b-5. The possibility of alternate grounds of decision creates additional doubt. The Zambian court may have found, for example, that proof of individual reliance is required under the common law—although it is not required under Rule 10b-5. Compare the comments of Lord Maugham, *supra,* with the recent holding of this Court in *Affiliated Ute Citizens of Utah v. United States,* — U. S. —, 31 L. Ed. 2d 741, 761 (1972).[9] Thus, the Zambian Court may have decided that there were material misrepresentations and omissions, but no proof of individual reliance.

The Petition states that the Zambian court viewed the allegations of misrepresentation through the record filed in this action. Petition at pp. 10-11. The Zambian court was undoubtedly aware that it had no person arguing before it in support of those allegations. See, 322 F. Supp. at 1351. The court may conceivably have waived a close scrutiny of those allegations in deferring to the scrutiny that awaited them in this action. The petitioners do not allege that they

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8. (Cont'd.)

courts is that a notice of meeting of shareholders must state with reasonable precision the nature of the business to be transacted at the meeting. *The Jenkins Committee* [studying the securities law of the United Kingdom] *was of the opinion that the existing law in the United Kingdom was not satisfactory and recommended that statutory provisions be enacted to set out in a general manner the responsibility of directors to give shareholders adequate information with respect to the nature of the business to be transacted at a meeting*". (Emphasis added)

9. The holding of *Affiliated Ute Citizens* is discussed at p. 12, *infra.*

informed the Zambian court of their intention to argue estoppel in this action.

It is thus unlikely that specific findings of disclosure favorable to petitioners were made as to each allegation. The speculative, constructive findings urged by the Petition cannot meet the test of certainty set forth by the Court in *Russell v. Place, supra,* and required as a matter of course for any collateral estoppel of fact.

D. Exemption From Section 14 of the Exchange Act Is Immaterial.

Also subsumed by the first Question, is the applicability of Section 10(b) of the Securities Exchange Act in view of a purported exemption from the proxy requirements of Section 14 of that Act (15 U. S. C. § 78n). No allegations in regard to Section 14 are to be found in the complaints in this litigation. But the petitioners repeatedly declare their exemption from that section. Their contention is, apparently, that exemption from the proxy requirements of Section 14 serves to exempt them from the requirements and standards of Section 10(b) and Rule 10b-5. This argument has already been summarily rejected by the Court. In *SEC v. National Securities, Inc.,* 393 U. S. 453, 468 (1969) the Court held that:

> "Respondents' alternative argument that Rule 10b-5 does not cover misrepresentations which occur in connection with proxy solicitations can be dismissed rather quickly. Section 14 of the 1934 Act, 48 Stat. 895, 15 U. S. C. § 78n, and the rules adopted pursuant to that section . . . set up a complex regulatory scheme covering proxy solicitations. At the time of the conduct charged in the complaint, these provisions did not apply to respondents . . . . But the existence or nonexistence of regulation under § 14 would not affect the

scope of § 10(b) and Rule 10b-5. These two sections of the Act apply to different sets of situations. Section 10(b) applies to all proscribed conduct in connection with a purchase or sale of any security; § 14 applies to all proxy solicitations, whether or not in connection with a purchase or sale. The fact that there may well be some overlap is neither unusual nor unfortunate . . . . Accordingly, we find no bar to the application of Rule 10b-5 to respondents' misstatements in their proxy materials."

II. The Petitioners' Second Question for Review.

The second of petitioners' questions (a) again raises the issue of the effect of exemption from Section 14 of the Act, settled by the Court, as noted above, and (b) seeks review to establish requirements of fraudulent intent and reliance under Section 10(b) of the Securities Exchange Act and Rule 10b-5.

A. Fraudulent Intent.

Respondents believe that the decisions of this Court and of the courts of appeals have already established that fraudulent intent is not required under Section 10(b) and Rule 10b-5. See, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186, 194-95, 200 (1963). Cf. *Affiliated Ute Citizens of Utah v. United States*, — U. S. —, 31 L. Ed. 2d 741, 760-61 (1972). Also, *Ellis v. Carter*, 291 F. 2d 270, 274 (9th Cir. 1961); *Royal Air Properties, Inc. v. Smith*, 312 F. 2d 210, 212 (9th Cir. 1962); *Kohler v. Kohler Co.*, 319 F. 2d 634, 637 (7th Cir. 1963); *Stevens v. Vowell*, 343 F. 2d 374, 379-80 (10th Cir. 1965); *Myzel v. Fields*, 386 F. 2d 718, 734-35 (8th Cir. 1967) *cert. den.*, 390 U. S. 951

(1968); *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d 833, 854-55, 862 (1968) *cert. den. sub nom., Coates v. SEC*, 394 U. S. 976 (1969).

But in any event the facts of this case render the question moot. In regard to the most prominent finding of material misrepresentation—that of failure to disclose the lack of inter-dependence of the acquisition by Zambia of certain RST assets and the RST-AMAX merger—the District Court found, and the Court of Appeals sustained a finding of, an intent to defraud. The District Court, referring to specific representations suggesting the interdependency of nationalization and merger, stated that:

> ". . . [T]heir *calculated and designed effect* was to persuade the stockholders that the amalgamation with AMAX was an inevitable consequence of the nationalization of RST and was the only possible way of complying with the Agreement between Zambia and RST . . ." 322 F. Supp. at 1360 (emphasis added).

The District Court also found that:

> "In addition to making *statements calculated to lead the stockholders to believe that the amalgamation with AMAX was the inevitable result of the nationalization, the defendants designed the instruction form* (PX-44) to the shareholders in such a way that a shareholder was required either to vote for or against both nationalization and amalgamation in a single vote." 322 F. Supp. at 1361 (emphasis added).

The Court of Appeals stated that:

> "The district court held that RST's proxy materials inaccurately portrayed the proposed amalgamation between AMAX and RST. In reaching its decision the court relied principally on the misleading manner in which the nationalization and amalgama-

tion plans were presented. It found that the proxy materials, particularly the descriptive language contained in the initial pages of the Explanatory Statement, were designed to create the false impression that the amalgamation, on the basis of the terms specified by the explanatory materials, was an inevitable consequence of Zambian nationalization. *Thus, fraud was found.*" 458 F. 2d at 262 (emphasis added).

The Court of Appeals concluded:

". . . [A]n examination of the proxy materials suggests that its authors made *a studied effort* to avoid stating explicitly that either amalgamation and nationalization were absolutely dependent or they were absolutely interdependent . . . . We therefore agree with the district court that the language of the Explanatory Statement impermissibly suggests that nationalization and amalgamation were interdependent and, under the circumstances, was a material misrepresentation." 458 F. 2d at 263 (emphasis added).

B. Reliance.

The Petition's contention that a finding of reliance is required under Section 10(b) and Rule 10b-5 runs counter to the holding of the Court in *Affiliated Ute Citizens of Utah v. United States*, — U. S. —, 31 L. Ed. 741 (1972). The Court held that:

"Under the circumstances . . . involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." 31 L. Ed. 2d at 761.

That contention, at pp. 22-3 of the Petition, relies, solely, upon the dissenting opinion in the Court of Appeals, 458 F. 2d at 288-91, which antedates the *Affidiated Ute* decision of this Court.

The Petition obfuscates the factual setting in regard to reliance by its references to the named respondent's letter to shareholders. The thrust of that letter was directed to the question of fairness, rather than to misrepresentation. The Court of Appeals found that:

> ". . . Kohn's letter set forth his attack on the fairness of the amalgamation. He did not purport to set forth the other material misrepresentations in the proxy statement. His position on this point was preserved in the court's order." 458 F. 2d at 265.[10]

The Court of Appeals could have rested on this finding alone.

In addition, it expressed the view that:

> "[A]ny otherwise material violation of the disclosure rules is not obviated by referring to materials of an opposing soliciting party." *Id.*

This view is well grounded in its recognition of shareholder reliance on management, and in the remedial purpose of the Securities Exchange Act. As the Court said in *Superintendent of Insurance of New York v. Bankers Life & Casualty Co., et al.*, 404 U. S. 6, 12 (1971), "Section 10(b) must be read flexibly, not technically and restrictively." Neither the facts, nor the sound statement by the Court of Appeals

10. "The [District] Court's order specifically provided that inclusion of Kohn's letter was 'without prejudice to plaintiffs' claims that [the proxy material] was in substance materially misleading or otherwise violative of Section 10(b) . . . and Rule 10b-5'. . . ." 458 F. 2d at 260.

as to the law, warrant reconsideration of the Court's recent decision in *Affiliated Ute Citizens, supra.*

III. The Petitioner's Third Question for Review.

A. A Finding of Fairness Does Not Bar Relief for Violations of the Exchange Act.

The Petition's third and final question seeks review of the discretionary judgment of the District Court providing equitable relief. Raised once again, in argument directed towards this question, is the claimed effect of an exemption from Section 14, discussed, *supra*, at pp. 9-10. Once again, the Petition musters a purported "absence of any evidence of advertent misconduct" (Petition at pp. 23-4), despite specific findings of such misconduct. 322 F. Supp. at 1360-61; 458 F. 2d at 262-63.

Also relied upon is the determination of the Court of Appeals that the issue of the fairness of the terms of merger was foreclosed because of a finding of fairness by the Zambian court. By this determination, the Court of Appeals in effect reversed the District Court's finding of fact and conclusion of law that the terms of the merger were unfair.[11]

A finding of fairness, however, does not bar relief under the Court's decision in *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970). The Court in that case reversed a decision below which:

". . . by permitting all liability to be foreclosed on the basis of a finding that the merger was fair, would

11. The error of this determination, in view of exclusive federal jurisdiction under the Securities Exchange Act, forms the basis of the respondents' own Petition for Certiorari, which is unopposed. See, Pettion of respondents herein for a Writ of Certiorari, filed June 29, 1972, No. 72-5, October Term, 1972, at pp. 12-3.

allow the stockholders to be bypassed . . . . A judicial appraisal of the merger's merits could be substituted for the actual and informed vote of the stockholders." 396 U. S. at 381.

The Court observed in so holding, that:

> "There is no justification for presuming that the stockholders of every corporation are willing to accept any and every fair merger offer put before them . . . . Proof of actual reliance by thousands of individuals would . . . not be feasible . . . and reliance on the nondisclosure of a fact is a particularly difficult matter to define or prove . . . . In practice, therefore, the objective fairness of the proposal would seemingly be determinative of liability. But, *in view of the many other factors that might lead shareholders to prefer their current position to that of owners of a larger, combined enterprise, it is pure conjecture to assume that the fairness of the proposal will always be determinative of their vote.*" 396 U. S. at 382, n. 5 (emphasis amended).

The role of the District Court in affording relief is the exercise of "the sound discretion which guides the determinations of courts of equity". *Hecht Co. v. Bowles*, 321 U. S. 321, 329-330 (1944), cited with approval in *Mills v. Electric Auto-Lite Co.*, 396 U. S. at 386. The Petition does not set forth in any manner why the relief ordered by the District Court and affirmed by the Court of Appeals is "drastic".[12] The Petition does not begin to establish an abuse of discretion.

12. Nor does it disclose that the relief ordered is a flexible one, in the form of an alternative offer which can be accepted or rejected by the individual shareholders.

CONCLUSION.

For the reasons set forth, the Petition of Roan Selection Trust Limited and American Metal Climax, Inc. for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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